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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DUANE A. VANTUINEN et al., Defendants and Appellants.	B261581 (Los Angeles County Super. Ct. No. BA415000)
In re EDWIN LYNN VALENTINE, on Habeas Corpus.	B270299 (Los Angeles County Super. Ct. No. BA415000)

APPEAL from judgments of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed in part, reversed in part, and remanded in part with directions. The habeas corpus petition is denied.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant Duane A. Vantuinen.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Randall Joseph Whitmore.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Edwin Valentine.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

This case involves a conspiracy on the part of defendants and appellants Duane A. Vantuinen, Randall Joseph Whitmore, and Edwin Lynn Valentine—working together with Joshua Box, Lorraine Vasquez, Cory Mulligan, Brian Duran and Margaret High—to burglarize the homes of Los Angeles and San Bernardino County newspaper subscribers who requested temporary vacation stops of newspaper delivery. Most of the victims were customers of the Los Angeles Times, but some subscribed to other papers such as the Inland Valley Bulletin.

The evidence demonstrated that Vantuinen, while working as a machine repairman for various newspaper distributors, stole vacation stop lists and passed them along to his co-conspirators who carried out the burglaries. Using these lists, Box and Whitmore were able to commit burglaries at homes they knew would be temporarily unoccupied. The other co-conspirators apparently helped store and dispose of burglarized items. Valentine and Vantuinen also helped dispose of some of the stolen property.

The defendants were charged by indictment[1] with having engaged in conspiracies to commit residential burglary and receive stolen property between April 2009 and September 2013. Following a jury trial, the defendants were convicted of conspiracy, burglary, and receiving stolen property.

On appeal, defendants raise various contentions of trial and sentencing error. For the reasons discussed below, we find that the June 2012 traffic stop of Whitmore for a seatbelt violation—a detention that ultimately resulted in discovery of the stolen vacation stop lists—did not violate the Fourth Amendment. We find the trial court did not err by denying Whitmore's mistrial motion, and that Whitmore and Vantuinen's convictions need not be reversed because of the way the trial court responded to a jury question during deliberations. We find that Vantuinen's multiple sentencing for separately possessing a rifle and ammunition that could be fired from that rifle did not violate section 654, but that his sentence for also possessing a shotgun should not have been stayed. Finally, we find there was insufficient evidence to sustain Valentine's Three Strikes sentencing based on his 1986 conviction for aggravated assault. Because Valentine raised this same sentencing issue in his accompanying habeas corpus petition, we will deny the habeas petition as moot.

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[1] The indictment, dated November 22, 2013, named the defendants in addition to other co-conspirators. However, after the co-conspirators' cases were resolved by plea agreements, the indictment counts were re-numbered as to the three defendants who went to trial and have now appealed.

BACKGROUND

This appeal follows a lengthy trial. Because much of the trial evidence is not relevant to the issues raised on appeal, we discuss the evidence in summary fashion, viewed in accordance with the usual rules of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

1. *Prosecution evidence.*

a. *The charged burglaries.*

The jury heard testimony from various victims whose homes were burglarized between April 2009 and September 2013. The victims' homes generally were ransacked, and items including electronics, jewelry, collectible coins, firearms, cars, family heirlooms, checkbooks, and credit cards were stolen. Some stolen property was subsequently recovered and returned to the victims; some was never found.

The testifying victims included the following people: Richard Stevens from Diamond Bar; Bassanio Peters from Hacienda Heights; Laura Ann Haydel from Los Angeles; Daniel Ma from La Puente; Lawrence Gebhardt from Hacienda Heights; Gary Dumas from Chino Hills; Charles Dickie from Chino Hills; Nget Fah Chong and her husband Cham Leong Quek from Chino Hills; Jonathan Joslin from Chino Hills; William Wong from Chino Hills; Tony Wang and his wife Evangeline Lin from Hacienda Heights; Lana Boutacoff and her husband Eric Remsen from Los Angeles; Mildred Ball from Ontario; Carl Smith from Culver City; Dennis Wilbourn from Ontario; Ronald Paden and his wife Nantana from Chino Hills; and Sheila Mauricio from Burbank.

b. *The police investigation.*

The police investigation involved the efforts of multiple law enforcement agencies: County Sheriffs from Los Angeles, Riverside and San Bernardino, along with local police from San Gabriel, Glendora, Arcadia, Burbank and Azusa. At different times during the course of this conspiracy, each conspirator was found in the possession of both burglarized property and illegal drugs (usually methamphetamine).

(1) *Whitmore's first arrest.*

In 2009, the San Gabriel Police Department searched the bedroom of Joshua Box in connection with an unrelated crime. The search of Box's bedroom revealed property from 26 different burglary victims and suggested a possible connection between Box and defendant Whitmore.

In May 2009, the Los Angeles County Sheriff's Department conducted a search of Whitmore's house and car. Deputies discovered a number of items that had been stolen from victim Stevens, including four rifles and a shotgun.

(2) *Whitmore's second arrest.*[2]

In April 2012, Whitmore tried unsuccessfully to access an ATM machine using a credit card stolen from one of the burglary victims. Thereafter, in June 2012, following a routine traffic stop, police arrested Whitmore on suspicion of possessing stolen

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[2] Whitmore, like some of the other conspirators, was arrested more than once during the course of the investigation. Because the charges involved only receipt of stolen property, he was released on bail.

property.[3] Officers searched Whitmore's car after his arrest, finding, among other things, a 10-page typewritten list containing the names and addresses of people who had requested Los Angeles Times vacation holds, as well as start and stop dates; and a five-page handwritten list containing similar information. Police also discovered in Whitmore's car a backpack containing burglary tools (including hand drills, drill bits, flashlights, a screwdriver, screwdriver bits, and bolt cutters), and jewelry, musical instruments, and a Ninendo game console stolen from the Lin/Wang family.

(3) *Los Angeles County Sheriff's Department investigation.*

After Whitmore's arrest, Detective Jack Jordan discovered more than 40 burglaries in Los Angeles and San Bernardino counties that had occurred at homes on the Los Angeles Times vacation lists. Further, by comparing the contacts in Whitmore's seized phone with individuals listed as employees of the Los Angeles Times, Jordan discovered a connection between defendant Vantuinen and the Los Angeles Times. Specifically, Jordan learned that Vantuinen worked as a subcontractor repairing the binding and tying machines used by newspaper distributors Hrach Besnilian and Gary Veron.

Both Besnilian and Veron testified that they had employed Vantuinen since 2009 to repair their binding and tying machines, and both testified that Vantuinen sometimes worked without supervision. Veron recognized one of the typewritten lists seized

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[3] The details of this arrest are discussed more fully in Section 1 of the Discussion.

from Whitmore's car as having been provided to his newspaper carriers in June 2012, and all the addresses on the handwritten list seized from Whitmore's car were Besnilian's customers. Two other newspaper distributors, Robert Cronkhite and Freddy Terrazas, also testified that they had hired Vantuinen and that he would have had access to their vacation hold lists.

(4) *Additional arrests and investigation.*

In July 2012, Box and Vasquez were stopped in a car containing burglary tools and stolen items, including coins, jewelry, a musical instrument, electronics, and purses. At about the same time, the San Bernardino Sheriff's Department distributed to other law enforcement agencies photographs of the person who attempted the April 2012 ATM withdrawal using one of the burglary victim's stolen credit cards. Detective Jordan recognized the person at the ATM machine as defendant Whitmore.

In November 2012, defendant Valentine was arrested driving a car stolen from one of the burglary victims. Also in November 2012, Detective Jordan searched Whitmore's residence and arrested him for possession of methamphetamine. In a detached garage near the house, Jordan found property stacked from floor to ceiling, including items stolen from victims Ma, Dickie, the Kakukas, Smith, Wong, and Chong. During a subsequent search of the garage, Jordan found additional stolen items belonging to Dumas, Paden, Wong, Gebhardt, and Boutacoff/Remsen.

At some point between December 2012 and January 2013, Whitmore was rearrested.

In January 2013, officers arrested Box and searched his house. Officers found Box's bedroom so full of stolen items that it

"looked like a pawn shop." Stolen property in the room was linked to nine of the burglary victims. Further, a memory card found in Box's bedroom was found to contain a video of Box and Whitmore entering the home of one of the victims.

(5) *Vantuinen's arrest.*

In January 2013, officers conducted a search of Vantuinen's Azuza house. In Vantuinen's bedroom, officers found a 20-gauge shotgun, a 22-caliber rifle, 22-caliber ammunition, and stolen property belonging to victims Dickie, Haydel, Dumas, and Wilbourn. In a shed near the house, officers found 0.4 grams of methamphetamine that Vantuinen admitted belonged to him.

On January 30, 2013, Vantuinen was arrested. Inside his backpack were antique coins belonging to victim Dickie.

(6) *Cell phone evidence.*

Telephone company cell phone data established that there had been hundreds of phone calls and text messages between various members of the conspiracy.

2. *Defense evidence.*

Michael Belanoff testified he ran an online retail business and had arranged to store some of his inventory in Whitmore's garage, including DVD's, toys, electronics, knives, swords and computers. Belanoff learned this property was later confiscated by the police. Valentine stayed at Belanoff's house from January to May or June of 2012, and while there was permitted to use Belanoff's telephone. Belanoff acknowledged he had suffered felony convictions for receiving stolen property, forgery and possession of narcotics for sale.

3. *Trial outcome.*

The jury convicted Whitmore of the two counts of conspiracy (Pen. Code, §§ 182/459 and 182/496 [conspiracy to

commit residential burglary; conspiracy to receive stolen property]),[4] five counts of burglary (§ 459), and four counts of receiving stolen property (§ 496). Vantuinen was convicted of the same two conspiracy counts, plus two counts of possession of a firearm by a felon (§ 29800), possession of ammunition by a felon (§ 30305), and possession of a controlled substance (Health & Saf. Code, § 11377). Valentine was convicted of the same two conspiracy counts, but acquitted on all other charges.

The defendants were sentenced to the following prison terms: Vantuinen – 8 years 4 months; Whitmore – 14 years 4 months; Valentine – 25 years to life.

CONTENTIONS

Whitmore contends that the vacation stop lists were discovered in his car as the result of an illegal police search; a mistrial should have been declared after the jury learned he had suffered prior arrests and convictions; and the trial court did not adequately answer a jury question during deliberations.

Vantuinen contends the trial court erred by failing to adequately answer the jury question, and that he was impermissibly sentenced for both illegally possessing a rifle and illegally possessing ammunition that could have been loaded into that rifle.

Valentine contends the trial court erroneously found his prior conviction for aggravated assault (former § 245, subd. (a)) was a strike under the Three Strikes law.[5]

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[4] All further statutory references are to the Penal Code unless otherwise specified.

[5] Valentine raises this issue both directly on appeal and indirectly via an ineffective assistance of counsel claim in his

DISCUSSION

1. *The trial court did not err by denying Whitmore's motion to suppress evidence seized from the June 2012 warrantless search of his car.*

Whitmore contends the trial court erroneously denied his motion to suppress the evidence seized from the June 2012 warrantless search of his car. (§ 1538.5.) According to Whitmore, although Glendora Police Department Officer Russell Ziino had the right to briefly stop him for failing to wear a seatbelt, Ziino was not permitted to detain him for 75 to 80 minutes or to search his car. As we now discuss, we find no error.

a. *Factual background*.[6]

At about 8:00 a.m. on June 24, 2012, Officer Ziino stopped Whitmore in a black Dodge Durango SUV for driving without having his seatbelt fastened. As Ziino walked toward Whitmore's car, he noticed "numerous items" piled in "the passenger's compartment," and a backpack and violin case on the rear floor.

Whitmore handed Ziino a valid driver's license, but expired registration and insurance cards.[7] Ziino testified that, during

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accompanying habeas corpus petition. Because we agree with Valentine's claim on appeal, we need not reach the merits of his habeas corpus petition and will deny it as moot.

[6] The following facts are based on Officer Ziino's testimony at the suppression hearing and a recording of the encounter between Ziino and Whitmore, portions of which were captured by Ziino's body microphone.

[7] In 2012, California Vehicle Code section 4000, subdivision (a)(1), provided that "[a] person shall not drive . . . any motor vehicle . . . unless it is registered and the appropriate fees have been paid under this code." Vehicle Code section 4454,

this initial contact, Whitmore "appeared nervous. He was sweaty, which I thought was odd for 8:00 in the morning" when the temperature was "in the mid 60's to low 70's." Further, Whitmore "was shaking slightly. He appeared nervous. He was perspiring. Based on my training and experience, I suspected he may have been under the influence of [an illegal] stimulant."

Ziino returned to his patrol car to have dispatch run Whitmore's name and license plate number through the police computer. Ziino testified that at that point, he already suspected Whitmore of being in possession of stolen property "because of the items in the car." Dispatch reported that Whitmore's driver's license was valid, but that Whitmore had a criminal record.

Ziino, now joined by Officer Stein, walked back to Whitmore's car and asked if Whitmore used methamphetamines. Whitmore replied that he last used methamphetamines a few years earlier. Ziino then asked Whitmore to step out of his car so Ziino could check him for drug use. Ziino patted Whitmore down for weapons and asked, "When's the last time you were arrested?" Whitmore said he had been arrested about two years earlier for stealing or attempting to steal copper wire. As a result of the

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subdivision (a), provides: "Every owner, upon receipt of a registration card, shall maintain the same or a facsimile copy thereof with the vehicle for which issued." And the version of Vehicle Code section 4462 in effect in 2012 provided: "The driver of a motor vehicle shall present the registration or identification card or other evidence of registration of any or all vehicles under his or her immediate control for examination upon demand of any peace officer."

copper wire incident, Whitmore apparently had been convicted of burglary.

Ziino conducted a sobriety test, ultimately concluding that Whitmore was not under the influence of a controlled substance. Ziino then asked for consent to search Whitmore's car, which Whitmore refused. The following exchange then occurred:

"[Ziino:] Okay. Do you have a valid insurance card or registration card?

"[Whitmore:] Yes, I do.

"[Ziino:] Is it in the car somewhere?

"[Whitmore:] Yes. I thought I handed it to you.

"[Ziino:] Both of those were expired, so I'm going to check your car for current registration and insurance. Okay? What is in the car that I need to be concerned about?

"[Whitmore:] Nothing. [¶] . . . [¶] There's no weed or nothing. I'm just saying it's [i.e., his vehicle documentation] in the center console. In the little flip hatch."

Ziino told Whitmore he was not under arrest, but that Ziino was going to search the car for proof of current registration and insurance. Ziino initially looked in the center console because that was where Whitmore told him the documentation would be. Inside the center console, Ziino found a valid insurance card, but no valid registration card. He then searched the glove box and behind the sun visor, but did not find a current registration card.

Immediately behind the center console, Ziino could see "a gray backpack with bolt cutters sticking out of it. I also saw pliers in there." The backpack was in plain view, "directly behind the center console . . . in the middle of the car on the floorboards." Ziino could see the bolt cutters and pliers because the zipper compartment of the backpack was open and the tools were

protruding from it. Ziino testified he "recognized those [as] items commonly used as burglary tools."

Ziino looked in the gray backpack because Whitmore said it was where he kept his paperwork. Ziino did not find any vehicle paperwork, but he found more tools and a list of some kind. Whitmore told Ziino that he used the tools in the backpack for his work as an electrician. Whitmore said: "I'm on unemployment. I just got off work as an electrician."

Ziino then checked two women's purses that were on the back seat; one purse was empty and the other contained video game controllers, one of which had a sticker with the name "Justin Wang" on it. Whitmore said the game controllers belonged to his kids. Ziino opened a violin case and a flute case; each contained an instrument. Ziino testified the reason he looked inside the gray backpack and the musical instrument cases was because "I thought it was possible that the registration card could be in there" and also because "I was trying to confirm my suspicions of stolen property."

Based on what he had seen, Ziino called dispatch and asked them to check on a recent burglary at a local music store to see if any violins or flutes had been taken; dispatch reported that they had not.

Whitmore gave Ziino permission to examine his cell phone. Ziino testified he saw a text message conversation between Whitmore and somebody listed in his contacts as Van. Subsequently, Whitmore told Ziino that Van was also called "Big D." Ziino testified that in that text message conversation, Van had sent Whitmore a text asking about "the coins. Have you brought those coins yet." Van also texted, "Where you at?," to which Whitmore responded, "Out in L.A.," and then Whitmore

texted, "[N]othing yet. Two alarms." Whitmore said the texts were "just two guys shooting the shit."

Ziino asked Whitmore "where he got all this stuff [in the car] from and [Whitmore] said he got it from his friend Big D. [¶] . . . in Covina." Ziino asked, "So if we called him up right now he'd say yeah, Randall just left my place and he picked up some stuff?" Whitmore replied, "I don't see why he wouldn't."

Ziino called Big D, identifying himself as a police officer. Whoever answered the phone denied knowing Whitmore. After the person hung up on Ziino, the following conversation occurred:

"[Ziino:] He doesn't know who you are. I called the number in your phone that says Van.

"[Whitmore:] Come on. He doesn't know who I am?

"[Ziino:] He says nobody in a black Durango was just at his house.

"[Whitmore:] What?

"[Ziino:] That's what he's saying.

"[Whitmore:] Damn. Wow.

"[Ziino:] So what's the real story? [¶] . . . [¶]

"[Stein:] Where did Van get this stuff from?

"[Whitmore:] It's my stuff. I had it [unintelligible] take it to my house.

"[Stein:] Why would he lie and say he hasn't seen you? . . . .

"[Whitmore:] I'd like to go and ask him too. . . . It blows me away."

After speaking to "Big D.," which Ziino estimated to have been 75 to 80 minutes after the traffic stop began, he believed there was probable cause to arrest Whitmore on suspicion of possessing stolen property. Ziino arrested Whitmore and had his car towed to the police station. A subsequent search uncovered

two more lists of names, dates and addresses. These turned out to be newspaper vacation stop lists that included some of the burglary victims. The search of Whitmore's car also yielded stolen property belonging to burglary victims Tony Wang and Evangeline Lin, "including the violin, flute, a checkbook, jewelry, a coffee maker, and a Nintendo device."

b. *Trial court's ruling*.

At the suppression hearing, defense counsel argued that once Ziino determined Whitmore was not under the influence of drugs, he was required to issue a seatbelt citation and allow Whitmore to go on his way. Everything that took place subsequently was an impermissible prolongation of the traffic stop and, therefore, the vacation stop lists and stolen items discovered in Whitmore's car had to be suppressed.

The trial court ruled otherwise, reasoning this had been "a case involving multiple investigations, starting from a de minimus seatbelt violation up through and including an investigation for possession of burglary tools and/or receiving stolen property. But one evolves into another during the course of this detention."

Citing *In re Arturo D.* (2002) 27 Cal.4th 60 (*Arturo D.*) and *People v. Webster* (1991) 54 Cal.3d 411, the trial court noted that "just because the defendant produces a valid California driver's license . . . does not mean the officer does not have the right to search for additional regulatory documents." Therefore, Ziino could lawfully search the center console, where Whitmore told him the missing documents would be, and while doing so Ziino noticed—in plain view—the possible burglary tools protruding from the gray backpack. The court concluded Ziino's suspicion that Whitmore was in possession of stolen property was

"supported by the defendant's own words that in the past, he has used burglary tools to commit theft, that being the copper wire."

The court noted that Ziino then gave Whitmore "every opportunity to justify or explain the need to have these items, that being the bolt cutter, pliers, [that] could be construed as burglary tools. . . . Did that flesh out to the defendant's benefit? It certainly didn't. It was to his disadvantage because, again, it helped heighten the officer's suspicions that there is illegal activity afoot given the text messages in the phone, the inability to confirm through Big D that the defendant had rightful possessory interest in all these items that were within this vehicle. At that point . . . I think the officer was reasonable in . . . forming the opinion that perhaps the defendant was in possession of burglar tools and perhaps in receipt of stolen property." The court held that, "given those justifications," Ziino reasonably extended the traffic stop in order to complete his investigation. Therefore, seizing the vacation stop lists did not violate the Fourth Amendment.

c. *Discussion*.

Whitmore contends the vacation stop lists and stolen property found in his car should have been suppressed because the traffic stop, although initially lawful, should have been terminated as soon as Ziino determined Whitmore was not driving under the influence of illegal drugs.[8] We disagree.

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[8] Even if Whitmore had been successful in suppressing the vacation stop lists, it would not have helped Vantuinen and Valentine. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has

(1) *Legal principles and standard of review.*

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision. [Citations.] An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. [Citations.]" (*Whren v. U.S.* (1996) 517 U.S. 806, 809–810 [116 S.Ct. 1769].)

"A seizure for a traffic violation justifies a police investigation of that violation. '[A] relatively brief encounter,' a routine traffic stop is 'more analogous to a so-called "*Terry* stop" [*Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868] (*Terry*)] . . . than to a formal arrest.' [Citations.] Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop. [Citations.] Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.' [Citations.] Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—

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not had any of his Fourth Amendment rights infringed." (*Rakas v. Illinois* (1978) 439 U.S. 128, 134 [99 S.Ct. 421].)

completed. [Citation.]" (*Rodriguez v. U.S.* (2015) 135 S.Ct. 1609, 1614 [191 L.Ed.2d 492] (*Rodriguez*).)

"Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' [Citation.] Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. [Citations.] These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. [Citation.]" (*Rodriguez*, *supra*, 135 S.Ct. at p. 1615.) Therefore, after a legal traffic stop, an "officer may temporarily detain the offender at the scene for the period of time necessary to discharge the duties that he incurs by virtue of the traffic stop." (*People v. McGaughran* (1979) 25 Cal.3d 577, 584.) However, "[a]n investigative stop can grow out of a traffic stop so long as the officer has reasonable suspicion of criminal activity to expand his investigation, even if his suspicions were unrelated to the traffic offense that served as the basis of the stop. [Citation.]" (*U.S. v. Gomez Serena* (8th Cir. 2004) 368 F.3d 1037, 1041.)

"The guiding principle in determining the propriety of an investigatory detention is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' [Citations.] In making our determination, *we examine 'the totality of the circumstances' in each case*. [Citations.] [¶] Reasonable suspicion is a lesser standard than probable cause, and can arise from less reliable information than required for probable cause, including an anonymous tip. [Citation.] But *to be reasonable, the officer's suspicion must be supported by some specific, articulable facts*

that are 'reasonably "consistent with criminal activity." ' [Citation.] The officer's subjective suspicion must be objectively reasonable, and 'an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]' [Citation.] But where a reasonable suspicion of criminal activity exists, 'the public rightfully expects a police officer to inquire into such circumstances "in the proper exercise of the officer's duties." [Citation.]' [Citation.]" (*People v. Wells* (2006) 38 Cal.4th 1078, 1083, italics added.)

"[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." (*Ornelas v. United States* (1996) 517 U.S. 690 [116 S.Ct. 1657].) A reviewing court must uphold the trial court's factual findings if they are supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301, disapproved on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

"A proceeding under section 1538.5 to suppress evidence is a full hearing on the issues before the superior court sitting as finder of fact. [Citations.] The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence. [Citations.]" (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410–411.) "Since

Proposition 8 . . . [was enacted in 1982] a court may only *exclude* evidence from a state criminal proceeding if exclusion is mandated by the *federal* exclusionary rule applicable to evidence seized in violation of the Fourth Amendment. [Citation.]" (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 867; accord *People v. Coffman* (2004) 34 Cal.4th 1, 43.)

(2) *A limited search of Whitmore's vehicle was lawful because Whitmore failed to provide adequate documentation during a valid traffic stop.*

Whitmore does not dispute that Ziino properly pulled him over because he was not wearing a seatbelt. (Veh. Code, § 27315, subd. (d)(1).) Whitmore also does not dispute that Ziino was permitted to detain him in order to conduct a field sobriety test because Ziino had a reasonable suspicion—based on the facts that Whitmore was shaking and perspiring—that Whitmore was under the influence of a stimulant. Whitmore contends, however, that Ziino was required to release him after writing a citation for the seatbelt violation and determining that he was not under the influence.

We do not agree. Once Whitmore had lawfully been stopped, Officer Ziino was entitled to demand Whitmore's driver's license and registration. (E.g., *People v. Saunders* (2006) 38 Cal.4th 1129, 1137, citing Veh. Code, §§ 4462, subd. (a), 12951, subd. (b); *Arturo D.*, *supra*, 27 Cal.4th at p. 67.) Further, because Whitmore did not produce a valid registration or insurance card, it was constitutionally proper for Ziino "to conduct a limited warrantless search of [his] vehicle for the purpose of locating registration and other related identifying documentation." (*Arturo D.*, *supra*, at p. 71.) Under our Supreme Court's decision in *Arturo D.*: "Limited warrantless searches for required

registration and identification documentation are permissible when, following the failure of a traffic offender to provide such documentation to the citing officer upon demand, the officer conducts a search for those documents in an area where such documents *reasonably may be expected to be found*. Under this standard, an officer may not search for such documents on pretext [citation], or without first demanding that they be produced [citation], and an officer may not search in containers or locations in which such documents are not reasonably expected to be found. [Citation.]" (*Id*. at p. 86, fn. omitted.)

Under *Arturo D.*, therefore, it was permissible for Ziino to search the center console of Whitmore's car because that was where Whitmore said a valid proof of registration and insurance would be found. And, when Ziino found a valid insurance card but not a valid registration, it was permissible for Ziino to search the glove box and behind the sun visor because those were areas where proof of registration reasonably may be expected to be found.[9]

(3) *Whitmore's continued detention was reasonable in light of the totality of the circumstances.*

While properly searching the center console for Whitmore's proof of insurance and registration, Ziino saw a gray backpack in which bolt cutters and pliers were visible. The backpack and tools—which Ziino recognized as commonly used to commit burglaries—were in plain view. (See *Quezada v. City of Los*

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[9] Whitmore asserts "[t]here was no reason for Ziino to believe a valid registration would be in the car," but of course there was: as Whitmore concedes a few lines later, he had "told Ziino the registration was in the center console."

Angeles (2014) 222 Cal.App.4th 993, 1006–1007 ["The United States Supreme Court has said, 'The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity. [Citations.] The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy.' "].)

At this point, Ziino could have arrested Whitmore based on probable cause to believe he was violating section 466 (possession of burglary tools).[10] (See *Illinois v. Gates* (1983) 462 U.S. 213, 244, fn. 13 [103 S.Ct. 2317] ["Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."]; *People v. Southard* (2007) 152 Cal.App.4th 1079, 1090 [defendant properly convicted of violating section 466 after found in possession of tools, including "multiple pairs of pliers, a large pair of bolt cutters," when requisite intent proved].) This would have allowed a warrantless

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[10] Ziino also had a reasonable suspicion that Whitmore was in possession of stolen property. Whitmore had admitted to a prior burglary conviction and his car contained common burglary tools. Whitmore had offered an implausible explanation for the presence of the tools: He said he had just gotten off work as an electrician, but also said he was unemployed. Whitmore was shaking and sweating, symptoms not explained either by the weather or by drug use. Finally, Whitmore's vehicle contained items, including two woman's purses and a pink backpack, that appeared not to belong to him.

search of Whitmore's car for stolen property, including a search of such closed containers as the women's purses and the instrument cases. (See *People v. Evans* (2011) 200 Cal.App.4th 735, 753 ["Under the automobile exception [to the Fourth Amendment], police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found."]; see also *U.S. v. Ross* (1982) 456 U.S. 798, 824 [102 S.Ct. 2157] ["The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found."].)

Ziino did not immediately arrest Whitmore, however, but instead extended Whitmore's detention to permit further investigation into the facts. This was reasonable. (See *United States v. Arvizu* (2002) 534 U.S. 266, 273 [122 S.Ct. 744] [in determining the lawfulness of a temporary detention, courts look at the totality of the circumstances to see whether police have " 'particularized and objective basis' for suspecting legal wrongdoing"].) Subsequently, with Whitmore's consent, Ziino examined Whitmore's cell phone. Ziino saw suspicious texts from "Van," whom Whitmore said was also called "Big D." Ziino asked Whitmore "where he got all this stuff [in the car] from and [Whitmore] said he got it from his friend Big D." in Covina. Ziino asked, "So if we called him up right now he'd say yeah, Randall just left my place and he picked up some stuff?" to which Whitmore replied, "I don't see why he wouldn't." When Ziino called "Big D.," however, whoever answered the phone denied knowing Whitmore.

At this point, which Ziino estimated to have been 75 to 80 minutes after the traffic stop began, Ziino arrested Whitmore and conducted a search of his car.[11]

(4) *Whitmore's contentions are without merit.*

Whitmore argues Ziino either lied about not having dispatch check on whether the registration was current (when Ziino first returned to his patrol car), or—if he did not—that he should have because "[a]t that point in time, Ziino's entire reason for detaining Whitmore further was based on the expired registration card." But a few lines later, Whitmore himself provides the correct answer: "After speaking with Whitmore, Ziino suspected Whitmore was under the influence of a stimulant." The important point is that very soon after this traffic stop began there arose several indicators of criminal activity: Whitmore's nervous behavior, his lack of a current registration card, his criminal history involving both drugs and theft, and the possibility that his car contained stolen property. (See *U.S. v. Calvetti* (6th Cir. 2016) 836 F.3d 654, 667 [criminal history " 'related to the same suspicions that the officer was developing' " was "strong indicator[ ]" contributing to "reasonable suspicion of criminal activity"].)

Whitmore argues "this Court ought not give credence to Ziino's claim that Whitmore looked 'nervous' as justification for anything. This claim is an overused sham to prolong . . . detentions unnecessarily." It is true that, standing by itself, nervous behavior is generally an insufficient reason to suspect

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11 Whitmore does not contend that the search of his car incident to his arrest was improper.

criminal activity. But many cases have cited it as a legitimate articulable factor when combined with other suspicious factors. (See *U.S. v. Calvetti*, *supra*, 836 F.3d at pp. 666–667 [although nervousness was "a relevant but 'unreliable indicator, especially in the context of a traffic stop,' " when added to other factors it helped "establish that the officers had reasonable suspicion necessary to justify expanding the initial stop"]; *U.S. v. Awer* (1st Cir. 2014) 770 F.3d 83, 91 [legitimate factors pointing to possible criminal activity included defendant's "heavy breathing and sweating"]; *U.S. v. Lyons* (7th Cir. 2013) 733 F.3d 777, 782 ["Officer Burns noted that Lyons appeared nervous, and that his hands were shaking. Although not conclusive, such observations may contribute to reasonable suspicion."]; *U.S. v. Cotter* (8th Cir. 2012) 701 F.3d 544, 547 [that defendant "appeared nevous and shaky" was legitimate reasonable suspicion factor].)

The point is that it is the *totality* of circumstances that determines whether or not a temporary detention was reasonable. "[W]e must consider 'the totality of the circumstances—the whole picture.' [Citation.]" (*U.S. v. Sokolow* (1989) 490 U.S. 1, 8 [109 S.Ct. 1581].) Moreover, the accumulation of sometimes innocent-appearing details occasionally provides articulable reasonable suspicion warranting a continued detention. " '[T]he possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal—to "enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges. [Citation.]" ' [Citations.]" (*People v. Leyba*

(1981) 29 Cal.3d 591, 599.) "The fundamental objective that alone validates all unconsented government searches is, of course, the seizure of persons who have committed or are about to commit crimes, or of evidence related to crimes. But 'reasonableness,' with respect to this necessary element, does not demand that the government be factually correct in its assessment that that is what a search will produce." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 184 [110 S.Ct. 2793].) Hence, "[t]he possibility of an innocent explanation . . . does not preclude an officer from effecting a stop to investigate the ambiguity. [Citations.]" (*People v. Saunders*, *supra*, 38 Cal.4th at pp. 1136–1137.)

Whitmore complains that "Ziino failed to confirm or dispel his suspicions quickly. Worse, when one suspicion was dispelled Ziino manufactured another." Whitmore is ignoring the trial court's finding that Ziino credibly explained how the traffic stop was reasonably prolonged because he kept discovering new suspicious circumstances that he properly investigated in order to determine whether or not Whitmore "was in possession of burglar tools and perhaps in receipt of stolen property." (See *People v. Williams*, *supra*, 45 Cal.3d at p. 1301 [reviewing court must uphold trial court's factual findings if supported by substantial evidence].)

The record does not show that Ziino "manufactured" anything. He spotted the seatbelt violation from his patrol car. He testified that when he initially approached Whitmore's car, he noticed many items strewn about[12] and Whitmore being

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[12] Ziino testified he saw that "the rear passenger's compartment was loaded with numerous items" and that he

unusually sweaty, shaky and nervous. When Ziino informed Whitmore he had to produce a valid registration card, Whitmore told him to look in the center console. When Ziino did that, he saw burglary tools in the gray backpack. Ziino knew that Whitmore had fairly recently both used methamphetamine and been convicted of theft. Whitmore offered numerous implausible explanations: he was unemployed but had just gotten off work; the video game items belonged to his children but one of them had a sticker identifying it as belonging to a Justin Wang; his text message about "two alarms" did not mean anything. Ziino tried to corroborate Whitmore's explanation for the property in his car by making a phone call, but when the story did not check out Whitmore expressed total shock.

These accumulated suspicious facts were not all apparent when Ziino initially stopped Whitmore for the seatbelt violation; rather, they emerged over the next 75 or 80 minutes. There was, however, no evidence that Ziino purposely extended Whitmore's detention just to give himself time to possibly discover more suspicious facts. It is far more accurate to say that Ziino "discovered" these additional suspicious facts than to say that he "manufactured" them.

Whitmore's reliance on *People v. McGaughran*, *supra*, 25 Cal.3d 577, is misplaced because in that case a ten-minute delay in issuing a traffic citation, during which time the officer ran a warrant check, was held illegal because the requirements of a permissible *Terry* stop were clearly not met. As our Supreme

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"could see clearly through the rear window that there was stuff inside piled on the rear seats."

Court explained, the officer there purportedly relied on five different suspicious facts, but three of them were "wholly innocent" (the driver and his passenger were not local residents, they appeared to be lost, and they were adults traveling in the vicinity of a high school), and the other two (high crime area and a furtive gesture) were insufficient—by themselves—to warrant a reasonable suspicion of criminal activity. (*Id*. at pp. 588–590.) The facts of *McGaughran* could not be more different than the facts of the case at bar.

The trial court did not err by denying Whitmore's suppression motion.

2. *Denying Whitmore's mistrial motion was not error.*

Whitmore contends the trial court erred by not granting him a mistrial after the prosecution caused the jury to learn he had suffered prior arrests and convictions, and that when he was arrested he was possibly in possession of methamphetamine.

a. *Background*.

During Officer Ziino's trial testimony, the prosecutor asked the following series of questions about what he found in Whitmore's car when he made the traffic stop:

"Q. At that point in time did you make any other observations of anything in the car that was relevant to your investigation?

"A. Yes. I had a conversation with Mr. Whitmore about his previous convictions and he told me that he was—

"The Court: I tell you what, let's move onto another area of examination. [¶] Go ahead, Mr. Inaba [the prosecutor].

"Mr. Inaba: Okay. Maybe I can ask in a different way.

"Q. Without mentioning prior convictions, did [Mr. Whitmore] mention any incident involving copper?

"A. Yes.

"Q. Without mentioning any convictions can you tell us what he said about the copper?

"A. He told me the last time he was arrested was for stealing copper wire.

"Q. Did he tell you how long ago that was?

"A. Yes, and I don't recall the year.

"[Defense counsel]: Objection. Motion to strike this whole line of questioning.

"The Court: Overruled. But I think we probed that issue enough. [¶] So let's move on, Mr. Inaba.

"Q. By Mr. Inaba: You said you don't remember the year. Was it— [¶] If I can ask this one more question?

"The Court: Go ahead.

"[Defense counsel]: Objection.

"The Court: Overruled. [¶] Go ahead, let's get that information.

"Q. By Mr. Inaba: This stop occurs in June 2012. When you said [you are] not sure of the year, do you remember whether or not [it was] in 2012, the year that you did the stop, or some prior year?

"A. Prior year.

"Q. So 2011 or—

"A. Or earlier."

Defense counsel subsequently asked for a mistrial because "[e]vidence was presented by Officer Ziino that's totally inappropriate about my client's criminal history. Not only did he do it once, but he did it two more times during his testimony, and it's absolutely inappropriate and no way I'm going to avail [*sic*: prevail?] in front of the jury."

The trial court acknowledged that this kind of information could prejudice a jury, but denied the mistrial motion because "the jury only heard that Mr. Whitmore may have been arrested, and in Officer Ziino's mind, convicted, but they know not what for, I don't think it rises to the level of so prejudicial conduct that it's [going to] deny Mr. Whitmore a fair trial. . . . [B]ut I will admonish the jury if, . . . you wish, and I'll do it right away, that they are to disregard any mention by Officer Ziino of a prior arrest connected to Mr. Whitmore and nothing more." Defense counsel declined the offer, saying "I think the admonishment would raise the specter of the criminal history even further and highlight it for the jury."

In later trial testimony, Detective Jordan testified about going to La Verne on November 29, 2012, to arrest Whitmore. Jordan testified Whitmore was taken into custody and searched. The prosecutor asked if the items taken from Whitmore's possession included "any kind of controlled substances?" Jordan testified one item taken from Whitmore appeared to be methamphetamine. Defense counsel objected and a sidebar followed. Defense counsel told the trial court: "My objection is that possession of methamphetamine is filed and charged in a completely different case. It has nothing to do with this case. It's completely irrelevant. He's only bringing it up to prejudice my client." The prosecutor argued the evidence went to motive, pointing out that "multiple individuals in this case are in possession of methamphetamine. . . . I think I even . . . stated it in my opening, that that is the motivation for why they are doing all these residential burglaries. They are trying to get money to buy drugs."

The trial court noted there had been evidence that Vantuinen, Valentine, High, Duran and Mulligan had all been associated with drugs, and "that can help explain why individuals would commit thefts, which is typical of people who abuse drugs. If this helps the People establish or explain why Mr. Whitmore is involved, well, then, so be it. It is relevant. It's not prejudicial to the extent that it's going to deny Mr. Whitmore a fair trial. It is motive evidence and I cannot keep it out."

b. *Discussion.*

"A motion for mistrial is directed to the sound discretion of the trial court. We have explained that '[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " [Citation.] (*People v. Jenkins* (2000) 22 Cal.4th 900, 985–986.) A mistrial motion should be granted if the trial court determines a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Welch* (1999) 20 Cal.4th 701, 749.)

Whitmore argues he was prejudiced because the jury learned he had multiple prior arrests and convictions, that "[his] last arrest was for stealing copper wire in 2011 or 2010", and that he was in possession of methamphetamine when he was arrested. He asserts that "[m]ost jurors likely would view an arrest in 2010 or 2011 as recent relevant to the charged offenses." The problem with this part of his argument is that it misstates Officer Ziino's testimony, which was only that he believed Whitmore had last been arrested for stealing copper wire in 2011 "or earlier." In any event, we agree there was a danger that Ziino's testimony might

prejudice the jury because theft was precisely the crime Whitmore was now on trial for: residential burglaries, conspiracy to commit burglary and conspiracy to receive stolen property. Even the Attorney General concedes that "Ziino should not have mentioned appellant Whitmore's prior conviction and arrest."

Evidence of a defendant's prior arrests or convictions is generally deemed unduly prejudicial and inadmissible. "There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580; see, e.g., *People v. Anderson* (1978) 20 Cal.3d 647, 650 ["it has long been held that evidence of an accused's prior arrests is inadmissible."].) However, although "[a]n improper reference to a prior conviction may be grounds for reversal in itself [citations] [such evidence may be] nonprejudicial 'in the light of a record which points convincingly to guilt.' " (*People v. Rolon* (1967) 66 Cal.2d 690, 693; compare *People v. Harris*, *supra*, at p. 1581 [harmless where evidence of guilt was "overwhelming"] and *People v. Duran* (1969) 269 Cal.App.2d 112, 119 [harmless where evidence "convincingly pointed to defendant's guilt"] with *People v. Rolon*, *supra*, at pp. 693–694 [not harmless in very close case: there were unimpeached alibi witnesses and the admitted perpetrator testified his accomplice had been somebody else]) and *People v. Allen* (1978) 77 Cal.App.3d 924, 935 [not harmless because "an extremely close case"].)

In this case, the evidence against Whitmore was overwhelming: the vacation stop lists were found in his car; stolen property was found in his possession; there was a video of him entering Ma's house in order to commit burglary; he was

photographed trying to obtain money from an ATM machine using Dumas's stolen credit card; and he left his DNA on a cigarette butt found at the scene of the Dickie burglary. In his opening brief on appeal, Whitmore has not one word to say about the vast amount of inculpatory evidence presented against him at trial. Whitmore relies on *People v. Allen*, *supra*, 77 Cal.App.3d 924, but that was "an extremely close case" in which a reference to the fact the defendant was on parole might well have tipped the balance. (*Id.* at p. 935.) The case at bar was far different from that case.

Hence, the trial court did not err by denying a mistrial because of the copper wire theft evidence.

Furthermore, we do not believe there was any error in admitting evidence that Whitmore had methamphetamine in his possession when arrested. As the trial court recognized, this evidence went to Whitmore's motive for being involved in the conspiracies and for committing the burglaries and receiving stolen property.[13]

In his reply brief, Whitmore states: "While the prosecutor argued [motive] as justification for introducing the [methamphetamine] evidence. . . . the prosecutor barely mentioned a methamphetamine motive during closing argument." We cannot agree with this characterization of the

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[13] "Evidence having a tendency to prove motive of the defendant to commit the particular crime charged is admissible to assist in resolving a doubt as to the identity of the perpetrator, no matter how that evidence may reflect on the defendant and even when it may show that he has committed other offenses. [Citations.]" (*People v. Morales* (1979) 88 Cal.App.3d 259, 264.)

prosecutor's following remarks during closing argument: "Finally, what is the overriding motive in this case that we've seen attached to every single suspect in this case? It's drugs. It's drugs. Mulligan OD's at the Morongo Casino . . . on heroin. Methamphetamine is found on Vantuinen, it's found on Whitmore, it's found on Box, it's found on [Margaret] High and Brian Duran. It's related to everything. Drugs are a motive in this case. [¶] We don't need to prove motive. There is an instruction that talks about that. But you can consider motive, again, as another element amongst the hundreds that link these defendants together."

Moreover, even if the methamphetamine testimony should not have been admitted, we would still find that—as with the theft arrest testimony—in light of the overwhelming evidence against Whitmore the result would have been no different without the evidence. (See, e.g., *People v. Davis* (2005) 36 Cal.4th 510, 555 [finding *Miranda* violation harmless because, "[g]iven the many other damaging admissions defendant made on the tape recording, the error in admitting this very brief exchange was harmless beyond a reasonable doubt. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial."].)

There was no error in denying Whitmore's mistrial motion.

3. *Trial court did not err in responding to jury question.*

Whitmore and Vantuinen contend their convictions must be reversed because the trial court failed to adequately respond to a question from the deliberating jury. We disagree.

a. *Background*.

While deliberating, the jury sent the following question to the trial court: "Legally, is indirect circumstantial evidence enough to charge someone with committing burglary?' " In response, the trial court said: "Well, not only is it enough to charge someone, it's enough to convict someone of a burglary. But remember the jury instruction regarding circumstantial evidence. If you can draw two or more reasonable conclusions from the circumstantial evidence and one reasonable conclusion points to innocence and another to guilt, you must adopt the one that points to innocence. However, when considering circumstantial evidence, you must consider only reasonable conclusions. You must reject any that are unreasonable. So, again, hopefully, that will answer [your question]."

Whitmore and Vantuinen contend the trial court's response was inadequate because the jury had no business worrying about what evidence was sufficient for charging a defendant, the court failed to clarify that there is no such thing as "indirect circumstantial evidence," and the jury was likely to have believed it could convict the defendants based on some standard less than beyond a reasonable doubt.

b. *Discussion*.

Section 1138 provides: "After the jury have retired for deliberation, if. . . they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." "The court has a primary duty to help the jury understand the legal principles it is asked to apply.

[Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

As the Attorney General points out, defendants waived this issue by not, at the time, objecting to the trial court's answer.[14] (See *People v. Kageler* (1973) 32 Cal.App.3d 738, 745–746 [failure to object when trial court answers jury question may be construed as tacit approval and waives issue for appeal]; see also *People v. Boyette* (2002) 29 Cal.4th 381, 430 ["When the trial court proposed its decision not to respond to the juror's note . . . defendant did not object. He thus failed to preserve the issue for appeal and, indeed, may be held to have given tacit approval of the trial court's decision. [Citation.]"].)

But even had the issue been preserved, we cannot see that there was any error.

The defendants complain the jury's question manifested a complete misunderstanding of circumstantial evidence and demonstrated that they had "invented" an imaginary third kind of evidence: direct evidence, circumstantial evidence and (the non-existent) "indirect circumstantial evidence." Vantuinen argues, "It is true the trial court instructed the jury on the

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[14] As Vantuinen acknowledges, by agreement of the parties defense counsel for Whitmore was standing in for all the defendants when this jury question was asked and he did not object to the court's answer to the question.

difference between direct and circumstantial evidence (CALCRIM No. 233 and how it was to use circumstantial evidence in deciding guilt or innocence (CALCRIM Nos. [234 & 235]). Yet, neither of these instructions discuss or include 'indirect circumstantial evidence,' the jury's definition or categorization of some of the evidence offered during trial. . . . To conclude that the term 'indirect circumstantial evidence' merely was a common or non-legal description of circumstantial evidence is speculation at best. Instead, the most logical conclusion is that the jury was referring to a lesser form of circumstantial evidence."

It appears to us, however, that it is defendants who are mistakenly speculating as to what was going on in the jurors' minds. In particular, both Vantuinen and Whitmore are ignoring the actual words of CALCRIM No. 233, which the jury was given by the trial court as follows:

"Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies that he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining.

"*Circumstantial evidence also may be called indirect evidence*. Now, circumstantial evidence does not directly prove the fact to be decided but is evidence of another fact or group of facts from which you may logically and reasonably infer the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

"Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge

including intent, mental state, and acts necessary to a conviction. Neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence." (Italics added.)

The defendants have entirely ignored the italicized language above which told the jury that "indirect evidence" and "circumstantial evidence" were the same thing. In light of this instruction, we find it far more likely that—rather than having invented a third category of evidence called "indirect circumstantial evidence"—the jury was merely being colloquial (albeit, redundantly so) in referring to what it believed to be the opposite of direct evidence. (See *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 ["The terms 'indirect evidence' and 'circumstantial evidence' are interchangeable and synonymous."]; accord *People v. Yokum* (1956) 145 Cal.App.2d 245, 250.)

Hence, we disagree with Vantuinen's assertion that the trial court somehow communicated to the jury that "some lesser form of evidence, or possibly even speculation, was sufficient for conviction." Rather, we agree with the Attorney General that, "[w]hile the jury's use of the adjective 'indirect' to describe circumstantial evidence may have been redundant, it was also understandable as a matter of common sense and parlance. It is likely that by using the word 'indirect' the jury was simply distinguishing circumstantial evidence as something different than 'direct' evidence." "[T]here was no reason for the court to believe that the jury had invented a new form of evidence out of thin air on its own initiative."

The defendants also complain that the trial court's answer "allowed the jury to conflate two standards, namely evidence

sufficient for *charging* a crime with evidence sufficient for *conviction* of that same crime.[15] In other words, the court failed to clarify that the jury was not to decide what evidence was sufficient for charging an individual with a crime." (Italics added.)

But the defendants do not dispute that the jury was adequately and properly instructed on the beyond-a-reasonable-doubt burden of proof borne by the prosecution, both by the instructions as a whole and by the two other circumstantial evidence instructions given to the jury (CALCRIM Nos. 234 & 235), which specifically directed that "before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt."

Moreover, the issue of "charging" was raised during closing argument when the prosecutor told the jury: "We started with a 2009 residential burglary involving Mr. Stevens, an L.A. Times customer burglarized while he was on vacation . . . . Why is that incident important? We didn't even *charge* Mr. Stevens as a victim of residential burglary." (Italics added.) And Valentine's counsel told the jury during closing argument: "The prosecution makes a lot out of the fact that, during these phone calls, Mr. Valentine knows about the vacation list. No, you are wrong.

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15 The burden of proof to charge a defendant with a crime, by either indictment or information, is " 'reasonable or probable cause' to believe that he or she was guilty" (*People v. Mower* (2002) 28 Cal.4th 457, 473), whereas the burden of proof for conviction is " 'beyond a reasonable doubt.' " (*Id.* at p. 477.)

Mr. Valentine was arrested, *charged* with receiving stolen property. Interesting, not burglary. Not burglary. He was *charged* with receiving stolen property." (Italics added.)

In light of these references to the charging aspect of a criminal prosecution, we disagree with Vantuinen's assertion that charging "was of no concern to the jury."[16]

Furthermore, the series of cases cited by the defendants that found reversible error in a trial court's response to a jury question were all cases in which the court misled the jury as to a very specific and crucial aspect of the case. (See *Bollenbach v. United States* (1946) 326 U.S. 607, 613 [66 S.Ct 402] [jury incorrectly told it could convict defendant of conspiracy to transport stolen notes even if he joined in their disposal after transportation had ended]; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 838 (en banc) [during capital case penalty phase, court's failure to answer jury question meant 11 jurors did not understand that defendant's mitigating evidence *must* be given

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[16] Although not denominated as an appeal issue, Whitmore complains that—contrary to the Bench Notes directions—the trial court instructed the jury with *both* CALCRIM No. 224 and CALCRIM No. 225. It is true that there is no need to give both instructions. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1172 ["CALCRIM Nos. 224 and 225 provide essentially the same information on how the jury should consider circumstantial evidence, but CALCRIM No. 224 is more inclusive."] But that's because No. 224 covers *any* use of circumstantial evidence, while No. 225 covers the use of circumstantial evidence to prove state of mind. Whitmore has not cited any authority, or given any reasoned argument, why he would have been prejudiced by the jury hearing both instructions.

consideration]; *U.S. v. Gordon* (9th Cir. 1988) 844 F.2d 1397, 1402 [by failing to answer jury question, court "fail[ed] to cure the risk of a nonunanimous verdict resulting from the duplicitous indictment"]; *People v. Hodges* (2013) 213 Cal.App.4th 531, 543 [court's response to jury question "was misleading because it allowed the jury to conclude defendant was guilty of robbery without regard to whether defendant intended to permanently deprive the owner of the property at the time the force or resistance occurred"]; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–391, disapproved on other grounds in *People v. Anderson* (2011) 51 Cal.4th 989, 998, fn. 3 [court failed to clarify for jury possible effect of "accident" defense on "willful intent" element of domestic violence charge]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251 ["trial judge's response that there is no relationship between heat of passion and premeditation was in error . . . [because] they are mutually exclusive"].) In the instant case, the court repeated the instruction regarding circumstantial evidence and did not misstate the law or mislead the jury.

Hence, we conclude the trial court did not err when it responded to the jury's question.

4. *There was no section 654 violation in Vantuinen's sentencing for possession of a rifle and ammunition, but his sentence for possession of a shotgun should not have been stayed.*

Vantuinen contends the trial court erred by not staying, under the authority of section 654, his concurrent sentence for illegal possession of ammunition because he was also sentenced for illegal possession of a rifle. We disagree. We also conclude, however, that the trial court did err by staying the sentence on Vantuinen's conviction for illegal possession of a shotgun. We

will reverse that sentencing decision and remand to the trial court for resentencing on that conviction.

a. *Legal principles.*

"Section 654, subdivision (a), provides in pertinent part, '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' Section 654 therefore ' "precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]" [Citation.]' [Citations.] However, if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]' [Citations.]

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce

from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1142–1143.)

b. *Background*.

Vantuinen was convicted for possession of a .22–caliber rifle found during the January 9, 2013, search of his residence. He was also convicted of possession of .22–caliber ammunition found during the same search. The rifle was found in a closet in Vantuinen's bedroom, and the ammunition was found under his bed in the same room.

Prior to sentencing, the trial court heard arguments on whether these offenses were subject to section 654. The court concluded that, because the ammunition was not loaded into the rifle but rather stored separately, section 654 did not apply.

Vantuinen argues this was incorrect because his possession of both a rifle and ammunition that could have been loaded into that rifle constituted but a single course of action with only a single intent: to possess a loaded gun. He asserts the Attorney General's position was that he "intended to sell the items separately and did not plan to use the rifle himself. But this is mere speculation without support in the record. Instead, appellant's objective was to possess the rifle and to have the ability to use and fire the rifle. He told Detective Jordan that he used the rifle for the purpose of hunting." Vantuinen argues that "[n]o evidence supports a conclusion that [he] illegally possessed the ammunition with a different criminal objective than his objective in possessing the firearm, namely to use the gun for hunting. He may have kept the ammunition separate from the rifle for safety reasons."

Even though Detective Jordan did testify Vantuinen told him he used the rifle for hunting, Jordan did not testify that

Vantuinen told him anything about the ammunition, and the context of Vantuinen's remarks on the subject would have given the trial court little reason to believe his "hunting" statement:

"Q. Did you ask him about the Mossberg shotgun and the .22-caliber rifle?

"A. [by Detective Jordan] Yes.

"Q. What did he initially tell you about that?

"A. That they were his and that they were used for hunting."

But when Jordan reminded Vantuinen that, as a convicted felon, he was not allowed to possess any firearms, Vantuinen said "[t]he firearms were not his."

Two of the cases relied on by Vantuinen are unhelpful to him. In both *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*), and *People v. Atencio* (2012) 208 Cal.App.4th 1239 (*Atencio*), there was only one item of contraband involved: a single gun. In *Jones*, possession of that single gun violated three statutes: possession of a firearm by a felon, carrying a readily accessible concealed and unregistered firearm, and carrying an unregistered loaded firearm in public. In *Atencio*, possession of a single gun resulted in convictions for grand theft and felon in possession of a firearm.

Both cases held that section 654 applied, either on the theory there had been only one act in each case or because the defendant only had a single intent and objective. As explained by *Atencio*: "If defendant's taking of the pistol and his possession of it through the following day are considered a single physical act, then pursuant to *Jones* defendant cannot be punished for the possession of the pistol in addition to being punished for the theft of it. But even if the taking and the subsequent possession do not

constitute a single physical act, defendant still can be punished only for the theft. This is so because when a defendant's crimes involve a course of conduct, '[w]hether [the] course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.' " (*Atencio*, *supra*, 208 Cal.App.4th at pp. 1243–1244, fn. omitted.) "The only point in *taking* the gun was to *gain possession* of it . . . ." (*Id*. at p. 1244.)

But the case at bar involved *two* items of contraband: the rifle and the ammunition.

A better case for Vantuinen is *People v. Lopez* (2004) 119 Cal.App.4th 132, which held that multiple punishment for possessing *a single loaded firearm* was proscribed by section 654. Of course, in the case at bar the ammunition was *not* loaded into the rifle, but Vantuinen argues that was not the basis for the holding in *Lopez*: "[T]he fact the bullets were loaded into the firearm was not the key fact upon which the *Lopez* Court concluded the sentence for unlawful possession of ammunition must be stayed under section 654. Section 654 applied because, 'the obvious legislative intent is to prohibit these persons from combining firearms with ammunition.' [Citing *Lopez*.] Ammunition is combined with a firearm when it is in the firearm *or* available to be loaded into the firearm."

We believe Vantuinen is quoting *Lopez* out of context and that the full text clearly indicates that it was *precisely* the fact that all of the ammunition had been loaded into the gun which rendered section 654 inapplicable. This is what *Lopez* said:

"While possession of an unloaded firearm alone can aid a person committing another crime, possession of ammunition alone will not. The former may be used as a club and a victim

may be fearful that the firearm is loaded. While the latter may be thrown at a victim, it is extremely unlikely that possession of bullets alone would scare anyone but the most timid. In combination, however, the mixture is lethal and that is why criminals have a penchant for loaded firearms.

"The Legislature has wisely declared that specified people should not possess firearms and/or ammunition. The obvious legislative intent is to prohibit these persons from combining firearms with ammunition. Appellant's obvious intent was to possess a loaded firearm.

"In resolving section 654 issues, our California Supreme Court has recently stated that the appellate courts should not 'parse[ ] the objectives too finely.' [Citation.] *To allow multiple punishment for possessing ammunition in a firearm would, in our judgment, parse the objectives too finely*. While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them. *Where*, as here, *all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment*." (*People v. Lopez*, *supra*, 119 Cal.App.4th at p. 138, italics added.)[17]

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[17] See also *People v. Sok* (2010) 181 Cal.App.4th 88, 100, fn. omitted ["[A]s the People concede, having sentenced Sok for his two convictions for unlawful possession of a firearm [citation], the trial court erred in failing to stay the sentences for counts 2 and 8 (unlawful possession of ammunition . . .), pursuant to section 654 because the ammunition at issue in those two counts was either loaded into Sok's handgun or had been fired from that gun."].)

We think this language clearly distinguishes the two situations: one where all the ammunition has been loaded into the firearm, and the other where the ammunition and the firearm are separate. The latter situation is akin to the simultaneous possession of multiple items of contraband, which even after *Jones* does not fall under section 654. As *Jones* explained: "We recognize that what is a single physical act might not always be easy to ascertain. *In some situations, physical acts might be simultaneous yet separate for purposes of section 654. For example*, in *Hayes*, both the majority and the dissenters agreed that, to use Chief Justice Traynor's words, '*simultaneous possession of different items of contraband*' *are separate acts for these purposes*. [Citation.] As Chief Justice Traynor explained, '*the possession of one item is not essential to the possession of another separate item*. One does not possess in the abstract; possession is meaningless unless something is possessed. *The possession of each separate item is therefore a separate act of possession*.' [Citation.] We do not intend to cast doubt on the cases so holding." (*Jones*, *supra*, 54 Cal.4th at p. 358, fn. omitted, italics added.)

Here, the trial court was not bound to believe Vantuinen's statement to Detective Jordan that he used the rifle for hunting. In fact, it was just as likely that the police found the rifle and ammunition in Vantuinen's bedroom (along with other stolen property) because they were stolen property that he intended to sell. As such, there is substantial evidence to support the trial court's section 654 finding.

However, we do not believe substantial evidence supports a second section 654 finding, although no party on appeal has raised the issue. That is, the trial court appears to have erred by

staying any sentence on Vantuinen's conviction for possessing the shotgun. (See *People v. Sanders* (2012) 55 Cal.4th 731, 743 ["Defendant's two convictions for violating section 12021(a)(1), based on his simultaneous possession of *two firearms,* are exempt from section 654's application because the Legislature intended that the possession of "each firearm . . . shall constitute a distinct and separate offense" under that statute. (§ 12001, subd. (k).)"].)

Because "[e]rrors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal" (*People v. Hester* (2000) 22 Cal.4th 290, 295), we will remand to the trial court for resentencing on Vantuinen's conviction for possessing the shotgun.

5. *Insufficient evidence of Valentine's strike allegation.*

Valentine contends there was insufficient evidence that his 1986 conviction for aggravated assault constituted a prior serious felony conviction, thereby making him subject to Three Strikes sentencing. This claim has merit, and we will reverse the strike finding and remand to the trial court for resentencing.[18]

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[18] In his current trial, Valentine did not contest the fact that he had been convicted in 1986 of aggravated assault, but he retained the option of challenging the *legal effect* of that prior conviction. At his sentencing hearing, Valentine argued that the facts surrounding his 1986 conviction were disputed and, therefore, it could not be proved that he had violated section 245, subdivision (a), by using a deadly weapon as opposed to using force likely to cause great bodily injury.

In 1986, Valentine pled guilty to violating section 245, subdivision (a), which—at that time[19]—prohibited assault "with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." However, to qualify as a strike under section 667, that prior conviction had to be for "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245." (§ 1192.7, subd. (c)(31); see *People v. Rodriguez* (1998) 17 Cal.4th 253, 261 ["one may commit the assault with force 'likely' to cause great bodily injury without . . . using a deadly weapon. Accordingly, the least adjudicated elements of the crime defined in section 245(a)(1) are insufficient to establish a 'serious' felony."].)

In *Rodriguez*, the People claimed the defendant's 1983 conviction for aggravated assault qualified as a strike. However, the only evidence they offered was an abstract of judgment showing that he (like Valentine) had pled guilty to former section 245, subdivision (a). *Rodriguez* held this proved nothing more than the least adjudicated elements of the offense, which did not prove the defendant had committed the crime in a manner qualifying it as a strike. *Rodriguez* said: "Certainly the prosecution was entitled to go beyond the least adjudicated elements of the 1983 conviction and use the entire record to prove that defendant had in fact personally inflicted great bodily injury

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[19] In 2011, the Legislature amended section 245 by deleting from subdivision (a)(1) the phrase "or by any means of force likely to produce great bodily injury," and by adding a new subdivision (a)(4) to section 245 which defined the offense of assault by force likely to produce great bodily injury. (Stats. 2011, ch. 183, § 1.)

(§ 1192.7, subd. (c)(8)) or personally used a dangerous or deadly weapon (§ 1192.7, subd. (c)(23)). (*People v. Guerrero* (1988) 44 Cal.3d 343, 355-356 . . . .) However, the People failed to do so. They offered only the abstract of judgment, which proved nothing more than the least adjudicated elements of the charged offense. The evidence supporting this strike allegation was thus insufficient, and the finding must therefore be reversed." (*People v. Rodriguez*, *supra*, 17 Cal.4th at pp. 261-262.)

In the case at bar, there were two principal sources of information regarding the 1986 incident, which apparently involved a violent encounter between Valentine and two others, on one side, and off-duty police officer Daryl Russell and his friend Arch Hobgood, on the other. One source was a partial excerpt from the preliminary hearing that led to Valentine's plea. Russell testified that a car driven by Frank Webb (carrying Valentine and his brother Dennis Copley) began harassing him and Hobgood. Russell testified that Webb and Valentine threw beer bottles, shattering his windshield and hitting him in the head, after which Russell retrieved a gun from his trunk and shot at Webb and Valentine when it appeared they were going to throw more bottles.

At the sentencing hearing, Valentine related a very different story. He testified he had been driving (not Webb) and that an argument between the two groups turned into a fistfight during which Webb was fighting with Russell while Valentine was fighting with Hobgood. Afterward, Russell went to his car trunk, retrieved a gun and shot Webb. Russell also shot at Valentine, but missed. Valentine testified he then threw a beer bottle at Russell which missed because Russell ducked. Valentine testified he threw the bottle "[b]ecause [Russell] shot at

me and missed and I was scared because the bullet came pretty close to my head," and "I was . . . throwing it just to . . . try to maybe divert his attention." Valentine testified he ran off after throwing that single bottle, but that other bottles were thrown by Webb and Copley.

The trial court acknowledged Valentine had been charged with both theories of aggravated assault in 1986—namely, use of a deadly weapon *and* use of force likely to produce great bodily injury—and that "[o]nly one of those two theories would qualify as a strike and that would be assault with a deadly weapon." The court also acknowledged that, when Valentine's plea was taken, "both theories were recited." Defense counsel argued "the strike is defective based on the ambiguity." The prosecutor argued the plea-taking was not ambiguous but, in any event, "the court is entitled to look behind . . . the information and the plea to the facts underlying the conviction," which "substantiate this is an assault with a deadly weapon." Relying on the police reports and the preliminary hearing testimony, the trial court concluded "there is ample evidence supporting assault with a deadly weapon, to wit, beer bottle."

Until recently, this analytic procedure would have been considered a proper action for the trial court to take. "[F]or years trial courts in California have been allowed to determine whether a prior conviction qualifies as a strike by looking to the 'entire record of conviction.' [Citations.] But in *Descamps* [*v. United States* (2013)] 570 U.S. __ [133 S.Ct. 2276], the United States Supreme Court pointed out the constitutional problems in doing so." (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1199.) "[A] court may not under the Sixth Amendment ' "make a disputed" determination "about what the defendant and state judge must

have understood as the factual basis of the prior plea," or what the jury in a prior trial must have accepted as the theory of the crime.' [Citation.]" (*Id*. at pp. 1207–1208.) Agreeing with *Saez*, the Court of Appeal in *People v. Marin* (2015) 240 Cal.App.4th 1344, 1362, concluded: "*Descamps* leaves no true room for debate that this type of factfinding violates the Sixth Amendment." (See also *People v. Wilson* (2013) 219 Cal.App.4th 500, 516 ["A court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense."].)[20]

Here there were disputed facts regarding how Valentine violated section 245, subdivision (a), in 1986. The Attorney General argues: "The court acknowledged the inconsistencies in the record as to who caused [Russell's] actual injuries but held that it was incontrovertible that appellant Valentine threw a beer bottle during the incident. Therefore, even assuming that appellant Valentine's bottle missed its target and did not cause the victim's injuries, there was still sufficient evidence to support the conviction for assault with a deadly weapon."

But as the Attorney General acknowledges, there were factual inferences that had to be drawn from the preliminary hearing testimony in order to reach that conclusion. For

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[20] Our Supreme Court is currently considering this issue in *People v. Gallardo*, S231260 (review granted Dec. 17, 2015), which presents the following issue: Was the trial court's decision that defendant's prior conviction constituted a strike incompatible with *Descamps v. U.S.* (2013) 570 U.S. __ [133 S.Ct. 2276] because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction?

instance: "[After] his windshield shattered from the impact of a beer bottle[,] . . . Russell saw appellant Valentine making a throwing motion with his arm and immediately was hit in the head with another bottle. *This constituted powerful circumstantial evidence* that appellant Valentine threw a bottle at Officer Russell." (Italics added.) Again: "Furthermore, appellant Valentine admitted that the bottle he threw at Officer Russell missed because '[h]e ducked.' This is important because it *implies* that appellant Valentine aimed the throw at Officer Russell with the intent to hit him, but that Officer Russell fortuitously moved out of the way." (Italics added.) Moreover, the trial court resolved a factual dispute by deciding to disbelieve Valentine's self-defense story, while believing Russell's story that there was no fistfight but only an unprovoked attack on him and Hobgood.

All of this the trial court was not permitted to do under *Descamps*. Valentine contends the trial court violated the Sixth Amendment by adjudicating factual disputes in order to find that his 1986 conviction had been for assault with a deadly weapon rather than assault by means of force likely to cause great bodily injury. As a result, Valentine argues, there was insufficient evidence to sustain a Three Strikes sentence. We agree and conclude his sentence must be reversed.

However, because retrial of a prior conviction allegation after a reversal for insufficient evidence is permissible (see *Monge v. California* (1998) 524 U.S. 721, 734 [118 S.Ct. 2246]; *People v. Marin*, *supra*, 240 Cal.App.4th at p. 1365), we will remand Valentine's case to the trial court for a retrial of this strike allegation.

DISPOSITION

The judgments are affirmed in part, reversed in part, and remanded in part with directions. Valentine's habeas corpus petition is denied as moot.

The judgment against Whitmore is affirmed. The judgment against Valentine is affirmed except as to the prior strike finding, which is reversed and remanded to the trial court for a retrial (which must be a jury trial unless waived by Valentine). The judgment as to Vantuinen is affirmed in part and reversed in part (as to the section 654 ruling regarding his conviction for possessing a second gun). Vantuinen's case is remanded to the trial court for resentencing on that conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.